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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. [redacted] 170

SAMUEL MOSLEY,

Petitioner,

against

CIA. MAR. ADRA, S. A.,

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

With undisputed testimony by plaintiff as to both the crude hook which slipped in use and the inadequate lighting where it was being used, the trial court mentioned both in a charge submitting only the issue of unseaworthiness (Charge, Petition, pp. 39, 41), to be determined from "*all the circumstances*" (Charge, Petition, pp. 36, 43).

On appeal from a judgment for plaintiff, Judges Marshall and Friendly nevertheless held that "two *alternate bases* of recovery" and "two *alternate grounds* as supporting the judgment" were involved (Opinion, Petition, p. 26) and that because the jury verdict was a general one "it is not possible to know upon which of these two alternate grounds it predicated the finding of unseaworthiness", and that "In these circumstances it is the duty of an appellate court to examine the adequacy of both grounds" and to reverse (rather than affirm) "If *one* of the grounds is found *adequate* and the other inadequate as a matter of law" (Opinion, Petition, p. 27). They held that although the evidence was adequate to support a finding of unseaworthiness "because of the condition of the lighting" it was inadequate to permit a jury to base a finding of unseaworthiness "*solely* upon the condition or fitness of the hook" (Opinion, Petition, pp. 27, 31); and that "In these circumstances, we have no choice under the principles of appellate review recited above but to reverse Mosely's judgment against Adra and remand for a new trial" (Opinion, Petition, p. 31).

The Petition seeks review of their decision as improperly invading the jury's function and province, both in holding the proof inadequate to support a conclusion that the shipowner failed to furnish petitioner with a safe tool to perform his task under the circumstances shown, and in holding that the judgment must be reversed unless the evidence would support a finding of unseaworthiness "*solely* upon the condition or fitness of the hook."

Pursuant to this Court's Rule 24, par. 4, petitioner submits this supplemental and reply brief because the recitals and contentions in respondents' briefs themselves show, as does the record, that respondents' motions, requests to charge, and exceptions "did not differentiate" (*Palmer v. Hoffman*, 318 U. S. 109, 119) between the hook and in-

adequate lighting but respondents herein maintained instead that there was not "any" evidence of "any" unseaworthiness; they made no motion or request at any time that the questions as respects the adequacy of lighting and as respects the condition or fitness of the hook be determined separately or specially or that the question of fitness of the hook be withdrawn from the jury (*Bailey* v. *Central Vermont Railway*, 319 U. S. 350, revg. 113 Vt. 8, 28 Atl. 2d 639, and see particularly *Bailey* v. *Central Vermont Railway*, 113 Vt. 433, 444, 35 Atl. 2d 365, 372, decided following this Court's decision and remand in 319 U. S. 350).

This brings into sharp focus and national importance the misinterpretation and misapplication by Judges Marshall and Friendly of "principles of appellate review" (Opinion, Petition, pp. 31 and 27) to improperly invade the jury's function and province by reversing instead of affirming the judgment upon holding that if the jury believed Mosley's testimony it could conclude that the vessel was unseaworthy because of inadequate lighting.

I. When, as here, the issue submitted was general, the verdict rendered was general, and respondents' motions to dismiss and for a directed verdict, their requests to charge, their exceptions to the charge and their motions for judgment n.o.v. and a new trial were general, and did not differentiate, nor ask the Court to differentiate, between the condition of the lighting and the condition of the hook, nor ask that any issue as respects the hook be withdrawn or excluded; an appellate court may not grant a new trial on a theory that proof as respects inadequate lighting was sufficient, but as respects the hook was insufficient, separately and alone to support the verdict.

The contrary ruling herein conflicts with controlling decisions on this important question of appellate review of jury trials.

Judge Marshall's opinion states that the trial judge "declined to direct a verdict on the cause of action based upon unseaworthiness, and that issue was submitted to the jury" (Opinion, Petition, p. 23); but no further mention is made of respondents' several motions to dismiss the complaint and for a directed verdict, their requests to charge, their exceptions to the charge and their motions for judgment n.o.v. and a new trial.

The Petition herein emphasizes that "neither of the respondents herein at any time requested any charge or made any motion to require the issue of unseaworthiness by reason of the hook to be determined apart from unseaworthiness by reason of the inadequate lighting"* (Peti-

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*In other words, they "did not differentiate between" the two (*Palmer v. Hoffman*, 318 U. S. 109, 119), and "all these were facts and circumstances for the jury to weigh and appraise" (*Bailey v. Central Vermont Railway*, 319 U. S. 350, 353, revg. 113 Vt. 8, 28 Atl. 2d 69); and see 113 Vt. 433, 444, 35 Atl. 2d 365, 372).

tion, p. 18). This is now confirmed by recitals and contentions in respondents' briefs herein.

Thus, the brief of respondent Lipsett Steel Products, Inc. states, at page 7, as respects both respondents, that:

> "*It was their position at the trial and on the appeal* in the Court of Appeals, that there was *a total lack of proof* of any negligence by the shipowner or *any* unseaworthiness of the ship." (Italics ours)

And the brief of respondent Cia. Mar. Adra, S. A., contends, at page 5, that

> "Since respondents had moved for *a directed verdict* at the close of petitioner's case and at the close of the entire case, the appellate court was required to review the evidence in order to determine whether there was *any* evidence on which to take the case to a jury." (Italics ours)

At page 6, it contends that appellate courts have power to review the evidence in order to determine as a matter of law "whether there is *any* evidentiary basis for the jury's verdict"; and, at page 8, that the Seventh Amendment does not prohibit the Court of Appeals from reviewing the evidence to determine "whether there is *an* evidentiary basis to support the verdict", or "whether *any* probative facts existed to support the conclusion reached."

But respondents then depart from this, and from the record, however, by making the *opposite* contention that if there is any one fact to be found among all the circumstances considered which, if isolated and "solely" considered would not itself be sufficient separately and *alone* to establish unseaworthiness, the finding of unseaworthiness must be reversed, notwithstanding that the other or remaining fact or facts are themselves sufficient to support the finding, even when similarly isolated and considered sepa-

rately and alone, and notwithstanding that all are related parts of "all the circumstances" showing unseaworthiness.

The record shows, at page 25a, that respondents' motions to dismiss the complaint at the end of plaintiff's case and after themselves resting were on the grounds that plaintiff "failed to make out a *prima facie* case", that the evidence is "*wholly* devoid of *any* facts which establish liability on the defendant shipowner in *any* respect, either for negligence or for unseaworthiness", that "Either as to unseaworthiness or as to negligence, there is *no* proof against the defendant", counsel stating that "where there is a total absence of proof of negligence and a *total* lack of proof of *any* unseaworthiness, there is *nothing* to be submitted to a jury" and that the case should be dismissed "for *total* lack of proof" (R. 25a). (Italics ours)

Respondents' counsel joined in a motion "for *a directed verdict* and for a dismissal of the complaint" (R. 26a).

A directed verdict in favor of defendant Adra on the negligence cause of action was granted, but the motions directed to the unseaworthiness cause of action were denied (R. 26a).

The Trial Court charged that the shipowner could be liable for unseaworthiness and that the shipowner's responsibilities to plaintiff and the issue of unseaworthiness were to be determined from "*all the circumstances*" (R. 31a; 37a; Petition, pp. 36, 43).

He charged:

"What are the obligations and the duties of the parties to this suit?

"What were the conditions aboard the vessel at the time of the accident, and how did they compare with the standard which the law imposes.

"Was the lighting adequate?

"What about the hook with which the testimony deals?

(Footnote continued on following page)

The exceptions to the charge (R. 46a-49a; Petition, pp. 52-55) and respondents' motions for judgment n.o.v. and a new trial (R. 52a-53a, 54a-55a) do not at any point or in any respect differentiate between the lighting and the hook, but are in every respect general.

The Federal Rules of Civil Procedure provide in Rule 50 that:

> "A motion for a directed verdict shall state the specific grounds therefor."

Rule 51 provides that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

(Footnote continued from preceding page)

"Did the plaintiff himself exercise reasonable care under the *circumstances*? If he did not, is that the end of the case?

"What really were Adra's responsibilities to the plaintiff under *all the circumstances*? And what about the obligations of Lipsett?

"These are some of the many questions that must be in your minds." (R. 30a-31a; Petition, p. 36) (Italics ours).

"You may not—*I emphasize*—you may *not* presume unseaworthiness from the mere fact that the plaintiff may have sustained injuries.

". . . The essential test is whether, *considering the place and circumstances*—not in some other case, in this case—*the condition of the area, the lighting and equipment*, were *they* or were *they* not reasonably fit to permit Mosley to perform his tasks with reasonable safety? That is for you to determine. And for this purpose you may take *all the circumstances*, including the duration of the conditions and the feasibility of more complete prevention into whatever account you think appropriate.

"A vessel is not unseaworthy merely because some imperfect condition may exist, if even so the vessel was reasonably safe and suitable and is reasonably fit for service as similar vessels in similar service" (R. 37a; Petition, pp. 42, 43) (Italics ours).

Judge Marshall did not quote nor refer to the last six of the paragraphs quoted here, containing the part concerning 'the circumstances' and 'all the circumstances'." (Opinion, Petition, p. 27)

Rule 38(a) provides that:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

In *Palmer* v. *Hoffman*, 318 U. S. 109, 119, *supra*, this Court said:

> "Petitioners in their exceptions to the charge given and in the requested charge *did not differentiate* between the causes of action based on the Massachusetts statute and those on the common law. *Even if we assume that the charge on the latter was erroneous*, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts *a general exception is not sufficient.* In fairness to the trial court and to the parties, *objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error.* Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." (318 U. S. 119) (Italics ours)

Palmer v. *Hoffman*, it will be noted, is wholly in accord with Rule 51 of the Federal Rules of Civil Procedure.

The charge herein simply "included the totality of the circumstances" (*Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, 369 U. S. 355, 363), all of which were for the jury to consider in determining whether there was unseaworthiness.

In *Bailey* v. *Central Vermont Railway*, *supra*, 319 U. S. 350, revg. 113 Vt. 8, 28 Atl. 2d 639; decedent was engaged in assisting to unload a hopper car filled with cinders, for which a wrench was used, and "The wrench used by Bailey was a heavy frog wrench—open jaws and a handle about three feet long. It had been used for many years for that purpose and no one had been injured by it" (319 U. S. 351). Bailey pushed a second time—"he gave another push on the wrench, the hopper opened, the nut spun, and Bailey was thrown by the wrench into the roadway below"; and he died of his injuries (319 U. S. 352). These facts were similarly recited by the Court below which had reversed a recovery by plaintiff for negligence (113 Vt. 8, at 10, 16, 22). This Court, reversing that decision, set forth as follows *eight* related facts and circumstances affecting the issue, and held, at page 353 of 319 U. S.:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—*all these were facts and circumstances for the jury to weigh and appraise* in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the Jury." (319 U. S. 353) (Italics ours)

After this Court's reversal and remand to the Supreme Court of Vermont, that court affirmed the judgment for plaintiff (*Bailey* v. *Central Vermont Ry., Inc.*, 113 Vt. 435, 35 Atl. 2d 365). On a motion for reargument (113 Vt. 444, 35 Atl. 2d 372) *defendant's position*, as stated by the

Court, was almost identical with that of respondents and Judges Marshall and Friendly herein, i.e.:

> "The *defendant's position*, in support of the motion is briefly stated, as follows: *Among* the issues of negligence submitted by the trial court to the jury was that of whether the defendant had furnished Bailey with proper tools with which to work; *the verdict was general;* this court held in its former opinion that there was no evidence of negligence to support the above stated issue; this holding was untouched by the decision of the United States Supreme Court, that court stating as there was evidence to go to the jury on the issue of safe place to work sufficient to support the verdict and judgment the other issues presented by the defendant were not reached; consequently as it is impossible to say whether the verdict was based on the issue of proper tools or on that of safe place to work and as it might have been predicated on the issue not supported by evidence the case must be reversed and a new trial ordered, as a general verdict which might be based on an issue not supported by evidence cannot stand." (113 Vt. 444-445) (Italics ours)

Rejecting that contention, the Court said (113 Vt. 445, 446):

> "The only exception to which it is claimed that such argument was addressed was the exception to the denial of the motion for a directed verdict. There were several grounds advanced in support of this latter motion but the only one relied on by counsel in the present instance was to the effect that the plaintiff failed to prove *any* negligence on the part of defendant. . . .
>
> "In addition it should be noted that the office of a motion for a directed verdict is to secure a judgment

for the party making the motion, and that is its only office. Counsel for the defendant does not claim that the now asserted ground for support of the exception to the refusal of the motion entitled the defendant to a judgment but, he says, it does entitle the defendant to a reversal and new trial. The only purpose or office of the exception as taken was to secure a review of the question of whether the defendant was entitled to a judgment. It should be apparent that the defendant cannot now use the exception for a purpose different from that for which it was originally taken." (113 Vt. 445, 446) (Italics ours)

The Court further held (113 Vt. 448):

"It was incumbent upon counsel for the present defendant to make a motion that the issue of improper tools or appliances be withdrawn from the jury, or to request an instruction to that effect, or to take some other similar and effective course, followed by the necessary exceptions, in order to have an exception available to present for our consideration the question he now attempts to raise. That the rule is the same in the second [illegible] circuit from whence come the last three referred to cases is shown by the late case of *Basso* v. *Palmer*, 138 F. 2d 914. Apparently in that case two grounds of liability of the defendant were submitted to the jury. It was held on review that the evidence to support one ground 'was extremely tenuous' but that there was evidence to support the other ground which made a case for the jury. The Court in the per curiam opinion says: 'If the defendant had wished to confine its liability, it should have asked the judge to exclude the issue of suction.' The judgment for the plaintiff was affirmed.

"Motion for reargument denied. Let full entry go down." (113 Vt. 448)

In *Basso* v. *Palmer*, 2 Cir., 138 F. 2d 914, there cited, the Court (L. Hand, Swan and Frank, CJJ.) said, per curiam, at page 915:

> "If the defendant had wished to confine its liability, it should have asked the judge to exclude the issue of suction. Since the case comes before us only as to the sufficiency of the evidence in *any* respect, we must consider both possible grounds of liability." (Italics ours)

That case holds that if, after considering two factual grounds for a jury's finding, the evidence is sufficient to establish one factual ground for the verdict it must be affirmed although the evidence might not be sufficient to establish the other factual ground.

The foregoing decisions are in accord with Rules 50 and 51 of the Federal Rules of Civil Procedure and are not in any respect overruled by *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U. S. 613. That case did not involve two elements of proof offered to sustain the same conclusion, but two entirely different legal grounds for which evidence was offered, and for one of which, unseaworthiness, the plaintiffs could have no right of recovery, though unseaworthiness was proved. Here petitioner was entitled to recover for unseaworthiness, the same as would a seaman (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 90); it was the only legal ground submitted; and since all of respondents' motions, requests to charge and exceptions were upon the ground that there was not "any" evidence to establish "any" unseaworthiness, the Court of Appeals should have affirmed the judgment for petitioner when that Court itself found the evidence adequate to support a finding of unseaworthiness because of the condition of the lighting; and it could not order a new trial merely because it found the evidence would be inadequate to support a finding of unseaworthi-

ness as though it had been based "*solely* upon the condition or fitness of the hook."

Arnold v. *Panhandle & S. F. R. Co.*, 353 U. S. 360, holding that "The jury's general verdict" had support in the evidence, is cited both in *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, *supra*, 369 U. S. 355, at 364 and in *Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U. S. 108, at 122, both relied on in the petition herein.

A condition of unseaworthiness, like negligence, may involve "many separate strands of circumstances" (Cf. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 63). It is not essential that each "strand" be sufficient separately and alone to establish unseaworthiness without the other related strands. A crude hook improvised from an old rod or pipe might be capable of safe use in broad daylight and for some purposes, and yet be most dangerous for use in pulling scrap loose from a chute down in a dark 'tween deck. "Indeed, if there was a reason hidden from the ordinary mind why this condition of things must have existed, those facts called upon the defendant to make that reason known" *Missouri, K. & T. R. Co.* v. *Williams*, 103 Tex. 228, 231, 125 S. W. 881, 882" (*Salem* v. *United States Lines Co.*, 370 U. S. 31, 37).

Where, as here, respondents offered no proof, and made no motions, requests to charge or exceptions, to differentiate between petitioner's unseaworthiness proof as to aspects the condition of the hook and the inadequate lighting where the hook was being used, a Court of Appeals decision reversing a jury verdict by holding that the verdict must be treated as though based "solely upon the condition or fitness of the hook" and the proof be held insufficient for that purpose, although sufficient as to the inadequate lighting (and, according, sufficient as to required use of the hook in the inadequate lighting), clearly violates the Seventh Amendment; Rules 38(a), 50 and 51 of the Federal Rules of Civil Procedure, and conflicts with

the decisions of this Court cited in the petition and those cited hereinabove. This aspect of the question presented is one of national importance as to "the principles of appellate review", under the Seventh Amendment, of cases tried by jury in Federal Courts.

II. The conflict and confusion in the Second Circuit.

In No. 1158 *Isthmian Lines Inc.* v. *Street*, a petition has been filed by defendant to review *Street* v. *Isthmian Lines Inc.*, 312 F. 2d 35, decided by another panel of the Second Circuit (Lumbard, Ch. J., Moore and Hayes, CJJ.), and cited by Judge Clark in his dissent herein. That case appears to be directly opposite to the decision of Judges Marshall and Friendly herein respecting the adequacy of proof from which, as held in the *Street* case, "the jury could conclude from the circumstances of the accident that plaintiff 'had been furnished no *safe* tool to perform his task'". In *Street*, the Court stated, in footnote 1, that "the jury could infer 'from what happened here, based on their own experience in life, that this kind of operation that this man did, whether he thought it was dangerous or not, was in fact dangerous and that this tool was, in fact, inadequate to do that job safely.'"

Walters v. *Moore-McCormack Lines*, 2 Cir., 312 F. 2d 893 shows, moreover, that the Second Circuit will not grant rehearing *en banc* to resolve any such conflict between panels in the Circuit itself.

Petitioner submits that *Street* v. *Isthmian Lines Inc.* was correctly decided by the Court of Appeals, and that *Mosley's* case was incorrectly decided by Judges Marshall and Friendly of the same Court.

As noted, page 12, *supra*, moreover, the decision of Judges Marshall and Friendly conflicts directly with that of another panel of the same Court (L. Hand, Swan and Frank, CJJ.) in *Basso* v. *Palmer*, 138 F. 2d 914, as to

whether a jury verdict can be reversed when the evidence is sufficient "in *any* respect", and defendant has made no motion, request to charge or exception by which to "differentiate" (*Pahlen v. Hoffman, supra*, 318 U. S. 109, 119) between two or more related elements or to exclude any particular element, but has objected only that there is not "*any*" evidence of "*any*" unseaworthiness.

As the Second Circuit has a greater number of active Judges than any other circuit—which, with retired Judges often recalled to sit, exceed in number the Justices of this Court—but they sit in panels of three, and its jurisdiction covers the greatest shipping and stevedoring port in the country, the manifest conflict and confusion of its panels on the important questions presented herein constitute additional reason for a grant of certiorari and determination by this Court herein.

The writ of certiorari prayed for should be granted.

Respectfully submitted,

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